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MAT GHAFFAR BABA

v.

KETUA POLIS NEGARA & ANOR

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COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
RICHARD MALANJUM JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: M-01-62-1999]

C

7 DECEMBER 2007

ADMINISTRATIVE LAW: *Dismissal - Police Inspector - Oral hearing, failure to accord - Whether a breach of procedural fairness and natural justice - Whether vitiating disciplinary proceeding - Whether*

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dismissal null and void - Federal Constitution, art. 135(2)

The first defendant, in dismissing the plaintiff from the police force, had refused to accede to the latter's request for an oral hearing thereof. Before the High Court, the learned judge ruled that there

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was no flaw in the first respondent's decision making process, and hence dismissed the plaintiff's application to declare the dismissal null and void. It was the further view of the learned judge that, notwithstanding the non-accordance of oral hearing, the plaintiff had been given a reasonable opportunity to answer the charges

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against him. The plaintiff appealed and argued that, bearing in mind the charges of corruption and dereliction of duties against him, he was entitled to have sight of the evidence and orally examine the witnesses that had implicated him in the wrongdoings. Before the learned justices of appeal, the issue that arose was

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whether the proceedings which resulted in the plaintiff's dismissal herein were in keeping with the rules of natural justice.

Held (allowing the appeal)
Per Arifin Zakaria JCA delivering the judgment of the court:

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(1) It was incumbent upon the disciplinary authority to initially consider the charges made against the plaintiff and to determine whether, in the light of the representations made by the plaintiff, an oral hearing was warranted. This they failed to

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do. (para 16)

(2) The charges against the plaintiff were general in nature and lacking in particulars as to the manner in which the alleged corruption took place. Consequently, questions may arise as to how the money was paid and whether there is any documentary or other evidence to support such allegations. Likewise, in respect of the alleged relation between the plaintiff and one Chinese lady, questions may also arise as to whether the allegation was supported by credible evidence, and if so why it could not be furnished to the plaintiff. It must be remembered that allegations of this nature can easily be made but not easy to rebut. (para 18)

(3) Considering the charges against him, the plaintiff ought, in all fairness, to have been given an oral hearing as requested by him. Similarly, documentary and other evidence purportedly relied upon by the first defendant in arriving at his finding ought to have been made available to him to enable the plaintiff to make an effective and meaningful defence to the charges. In the circumstances, we agree with the plaintiff that there had been a clear breach of the rules of natural justice as embodied in art. 135(2) of the Federal Constitution which renders the disciplinary proceedings null and void. (para 19)

[Order of dismissal set aside. Plaintiff ordered to be reinstated. SAR to determine salaries, emoluments and benefits due to plaintiff]

Bahasa Malaysia *Translation Of Headnotes*

Defendan pertama, ketika membuang kerja plaintif dari pasukan polis, telah enggan mengadakan pendengaran oral walaupun ianya dipohon oleh plaintif. Di hadapan Mahkamah Tinggi, yang arif hakim memutuskan bahawa tiada kecacatan pada proses membuat keputusan defendan pertama, dan berikutnya menolak permohonan plaintif untuk mengisytiharkan pembuangan kerjanya sebagai tak sah dan batal. Menurut yang arif hakim selanjutnya, walaupun pendengaran oral tidak diberi, plaintif masih diberi peluang yang munasabah untuk menjawab pertuduhan-pertuduhan yang dihadapkan kepadanya. Plaintif merayu dan berhujah bahawa, mengambilkira pertuduhan-pertuduhan rasuah dan mengabaikan tugas yang dihadapkan kepadanya, beliau berhak untuk melihat keterangan-keterangan dan menyoal saksi-saksi yang mendakwanya terlibat dengan kesalahan-kesalahan tersebut. Di hadapan yang arif hakim-hakim rayuan, isu yang berbangkit adalah sama ada prosiding yang membawa kepada pembuangan kerja plaintif di sini menepati kehendak kaedah-kaedah keadilan asasi.

Diputuskan (membenarkan rayuan)
Oleh Arifin Zakaria HMR menyampaikan penghakiman mahkamah:

(1) Adalah menjadi tugas pihakberkuasa disiplin untuk menimbang tuduhan-tuduhan yang dibuat terhadap plaintif bagi menentukan sama ada, dalam halkeadaan yang wujud, suatu pendengaran oral perlu diadakan. Ini gagal dibuat oleh mereka.

(2) Pertuduhan-pertuduhan terhadap plaintif adalah bersifat umum dan ketandusan butiran mengenai cara bagaimana perbuatan rasuah yang didakwa itu dilakukan. Dengan demikian, persoalan mungkin berbangkit tentang bagaimana wang tersebut disogokkan dan sama ada terdapat keterangan dokumentari atau keterangan-keterangan lain bagi menyokong alegasi tersebut. Begitu juga, mengenai dakwaan perhubungan yang dikatakan wujud di antara plaintif dan seorang perempuan China, persoalan mungkin timbul sama ada dakwaan itu disokong oleh keterangan, dan jika begitu mengapa ianya tidak boleh dikemukakan kepada plaintif. Sayugia diingat bahawa alegasi seperti ini senang dibuat tetapi sukar untuk disangkal.

(3) Mengambilkira pertuduhan-pertuduhan terhadapnya, plaintif patut diberikan pendengaran oral seperti yang dipohon olehnya. Begitu juga, segala keterangan dokumentari dan keterangan-keterangan lain yang defendan pertama bergantung kepadanya dalam mencapai keputusannya harus juga dikemukakan kepada plaintif bagi membolehkan beliau membuat pembelaan yang efektif dan bermakna terhadap pertuduhan. Dengan itu, kami bersetuju dengan plaintif bahawa telah berlaku pelanggaran yang jelas terhadap kaedah-kaedah keadilan asasi seperti yang terkandung di dalam fasal 135(2) Perlembagaan Persekutuan sekaligus menjadikan prosiding disiplin tak sah dan batal.

[Perintah pembuangan kerja diketepikan. Plaintif diperintah diambil bekerja kembali. PKP akan menentukan gaji, emolumen dan faedah-faedah yang terakru kepada plaintif.]

Case(s) referred to:

Ang Seng Wan v. Suruhanjaya Polis Di Raja Malaysia & Anor [2002] 1 CLJ 493 CA ***(refd)***

B Surinder Singh Kanda v. The Government of The Federation of Malaya [1962] 28 MLJ 169 ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Najar Singh v. Government of Malaysia [1976] MLJ 203 ***(refd)***
Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 CA ***(refd)***

Legislation referred to:
Federal Constitution, art. 135(2)
Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, GO 26

For the appellant - Christopher Fernando (Marisa Regina with him); M/s Aris Rizal Christopher Fernando & Co
For the respondent - Ishak Bahri SFC

[Appeal from High Court, Melaka; GS No: 21-5-1996]

Reported by WA Sharif

JUDGMENT

Arifin Zakaria JCA:

Background

[1] This is an appeal from the decision of the learned High Court Judge, Melaka dismissing the plaintiff's claim with costs. In this judgment I will refer to the respective parties as plaintiff and defendants. This appeal was heard by this court on 31 July 2003 where I sat with my learned brothers (JJCA) Abdul Kadir Sulaiman and Richard Malanjum. By a unanimous decision we allowed the plaintiff's appeal with costs both here and in the court below. We made an order in terms of prayers (1) and (2) of the claim coupled with other consequential orders. It was not until recently that I have been asked to write this judgment. This explains the unnecessarily long delay in writing this judgment.

The Facts

[2] The facts relevant to this appeal are briefly as follows. The plaintiff was at all material times a member of the Royal Malaysian Police Force holding the rank of Police Inspector. By a letter dated 31 July 1993, the 1st defendant directed the plaintiff to show cause why disciplinary action with a view to his dismissal ought not be taken against him. Six charges were levelled against him for corruption, dereliction of duties, failure to report gambling activities and for failing to take the necessary action against certain named persons. The plaintiff was given 16 days from date of receipt of the letter to furnish his answer to all the charges.

Apparently the disciplinary action was taken under General Order 26 of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980.

[3] By letter of 14 August 1993, the plaintiff furnished his representations in respect of all the charges. In short the plaintiff denied all the charges made against him and furnishing reasons in support of the same. What is crucial is that in addition to his reply, the plaintiff in para. 5 of his letter wrote:

> 5. Seandainya representasi saya ini tidak diterima oleh Yang Amat Berbahagia Tun, dan hukuman yang akan dikenakan ke atas saya masih di bawah Perbekalan 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 **saya memohon/menuntut supaya saya diberi satu peluang yang munasabah untuk didengar dalam satu perbicaraan secara lisan diadakan**. Ini akan memberi saya peluang menyoal balas (cross-examine) saksi-saksi yang dikatakan telah membabitkan saya dalam keenam-enam alasan **serta meminta semua keterangan/bukti yang ada**, memandangkan hukuman yang akan dijatuhkan melibatkan mata pencarian saya (livehood) dan juga nama baik (reputation) saya. (emphasis added)

[4] By this he asserted that in the event that his explanation is deemed insufficient to exculpate himself from those charges he prayed that an oral hearing be given to him to enable him to cross-examine all witnesses that had implicated him in the alleged wrong doings and further he requested for all evidence/proof be made available to him in view of the seriousness of the charges and the penalty that may follow.

[5] The 1st defendant ignored the plaintiff's request as per para. 5 of his letter and proceeded to consider the representations made by the plaintiff as contained in his letter of 14 August 1993. Having done so, the 1st defendant by letter of 5 October 1993 informed the plaintiff of the decision of the 1st defendant in regard to the disciplinary action. The plaintiff was found guilty of all the first three charges and that the other three charges were withdrawn (digugurkan). In the result the plaintiff was dismissed from service with effect from date of receipt of the letter.

Plaintiff's Case

[6] The plaintiff was dissatisfied with the decision of the 1st defendant and commenced this action against the 1st and 2nd defendants. In this action the plaintiff is seeking a declaration that

his dismissal from the Police Force is unlawful, unconstitutional, void and of no effect, and that for all intent and purposes he is still a police officer of the rank of Police Inspector.

[7] In support the plaintiff advanced, *inter alia*, the following grounds:

1) the defendant's actions were in violation of art. 135(2) of the Federal Constitution, in that he was not accorded a reasonable opportunity of being heard;

2) the show cause letter notifying him of their intention to have him dismissed, and with no alternative punishments proposed, before receiving his representations tantamount to prejudging the issues; and

3) favourable facts and circumstances that could have exonerated him were not considered by the defendants.

The High Court

[8] The learned High Court Judge did not find any merit in the plaintiff's case and dismissed the plaintiff's claim with costs. Having considered the plaintiff's contentions and the reply by the defendants the learned judge came to his conclusion that he was unable to find any flaw in the decision making process. He was satisfied that the plaintiff had been accorded reasonable opportunity to answer the charges against him, hence there was full compliance with the rules of natural justice.

The Contention Before This Court

[9] The plaintiff's main contention before us was that it is not in dispute that the plaintiff did ask for an oral hearing but denied by the defendants on the basis that it was not mandatory for the defendants to do so. The plaintiff's case is that in the circumstances of this case an oral hearing ought to have been granted. Failure to accede to the plaintiff's request had deprived him of his right to effectively put his case before the disciplinary authority. Hence, he had been deprived of his constitutional right under art. 135(2) of Federal Constitution which provides:

> 135. (1) ...
>
> (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

[10] This issue was considered by the learned judge under sub-head 3 of his judgment entitled – "Other Relevant Factors Required To Be Considered By The Court". In sub-para. (ii) he opined:

> (ii) Must the plaintiff be accorded the right to an oral hearing in this case? In the circumstances of the case the answer is in the negative. This is so for the following reasons. DW1 did admit that the plaintiff did request for it but was turned down. As there was no reason for any further enquiry, that oral hearing application had to be turned down (General Order 26(5)). It is trite law that an oral hearing is not an established right. The right to be heard merely bestows the aggrieved party the right to a reasonable opportunity to state his case, but certainly not the right to be heard orally. Articles 135(2) is also silent as to that latter interpretation (*Zainal Bin Hashim v. Government Of Malaysia* [1979] 2 MLJ 276; *Ghazi Bin Mohd Sawi v. Mohd Haniff Bin Omar, Ketua Polis Negara, Malaysia & Ano*r [1994] 2 CLJ 333).

[11] Although in the beginning the learned judge seems to suggest that in the circumstances of this case there was no need for an oral hearing. But in the next breath he said art. 135(2) does not confer a right to be heard orally. Learned counsel for the plaintiff submitted that in the circumstances of this case an oral hearing ought to have been given to the plaintiff and failure on the part of the 1st defendant to do so is a clear breach of the rules of natural justice.

[12] It is settled principle that the right to be heard as enshrined in art. 135(2) of the Federal Constitution does not in all cases include the duty to afford an oral hearing. (See *Najar Singh v. Government of Malaysia* [1976] MLJ 203; *Ghazi b. Mohd. Sawi v. Mohd. Haniff b. Omar* [1994] 2 CLJ 333; *Raja Abdul Malek Muzaffar Shah b. Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619. But as stated by Gopal Sri Ram, JCA in *Raja Abdul Malek Muzaffar Shah (supra)*:

> Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from attack. Cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed. (See *R v. Immigration Appeal Tribunal* [1977] 1 WLR 795).

> The categories of procedural fairness are not closed and the procedure adopted in a particular case may be fair or otherwise according to its own facts. The measure of fairness afforded to a particular plaintiff is a question of fact and of degree that is to be judged according to our own standards and values and not according to the standards and values of foreign judge, however eminent. That is not to say that we cannot obtain valuable assistance from other sources; but in the final analysis it is a question that is to be decided according to the Malaysian concept of fairness.

[13] That is the embodiment of the doctrine of procedural fairness.

[14] In *Raja Abdul Malek Muzaffar Shah* one of the complaints was that he was not afforded an oral hearing by the disciplinary authority. On the facts of that case this court came to its finding that there was no departure from the procedural fairness by the disciplinary authority as the charges were well drafted and care was taken to ensure that full particulars were provided. However, the appeal was allowed on other ground which does not concern us here.

[15] Another case which turns on a similar issue is the case of *Ang Seng Wan v. Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 1 CLJ 493 which was referred to us by learned counsel for the plaintiff. In that case the plaintiff, an Assistant Superintendant of Police, was dismissed from the force by the Suruhanjaya Polis Di Raja following a meeting convened to deliberate four charges of indiscipline against him. No committee of inquiry was set up and the plaintiff was also not supplied with the usual reports and statement of witnesses. The plaintiff was found guilty of all charges and was dismissed from the force. The plaintiff brought an action for declaration but was dismissed by the High Court. The plaintiff appealed. The issue before the Court of Appeal was whether the proceedings which resulted in the plaintiff's dismissal were in keeping with the rules of natural justice.

[16] In that case, having considered the charges and the representations made by the plaintiff, this court came to the conclusion that in the circumstances of the case the plaintiff ought to have been afforded an oral hearing. Failure to do so constitutes a breach of the procedural fairness and thus vitiating the proceedings before the commission. The appeal was allowed and the court ordered that the plaintiff be reinstated in the police force.

[17] In the present case the learned trial judge did not at all embark to consider the facts and circumstances of the case, although in his judgment he did say that the circumstances of the case do not warrant an oral hearing. We are of the view that it is incumbent upon the court to consider the facts and circumstances of each and every case.

[18] In the present case the first charge against the plaintiff was that he had received corrupt payments from one Chong Lee Lin in the sum of RM200 per month from 1 August 1989 to 22 September 1990. The payment was made through one Chong Hoon Wai. The second charge was for receiving corrupt payments from Lue Chan Kong in the sum of RM100 per month from 1 June 1989 to 22 September 1990. In return for the said payments he had rendered protection for illegal gambling activities in Seremban. The third charge was for having a relationship with one Chong Lee Lin between 1 August 1989 to 22 September 1990 knowing that she was carrying out illegal gambling activities in Seremban. At all material times the plaintiff was a training officer attached to the Negeri Sembilan Police Contingent.

[19] In his representations the plaintiff denied all the three charges levelled against him and denied knowing any of the persons mentioned in those charges. He further said that as the training officer attached to the Negeri Sembilan Police Contingent he had no knowledge about illegal gambling in Seremban as it was outside the scope of his duties. In para. 5 of his letter of 14 August 1993 he specifically stated that in the event that his representations are not accepted by the authority he prayed that he be given an oral hearing to enable him to cross-examine the witnesses that had implicated him in the activities as alleged in the three charges. This was denied to him.

[20] In line with the authorities citied earlier we think it was incumbent upon the disciplinary authority to initially consider the charges made against the plaintiff and to determine whether in the light of the representations made by the plaintiff an oral hearing was warranted. This, we think they failed to do. The reason for this came to light in the evidence of DW1 when cross-examined by counsel for the plaintiff. It reads:

S: (A) mukasurat 19. Mengapa oral hearing tidak diadakan seperti diminta? A

J: Betul dia memohon tetapi saya difahamkan ini tidak semestinya mesti diberi. Memang Bab D 26 dibuat begitu supaya permintaan tak menjadi hak. Jika penjelasan diberi dibenar. Itu pun ada jawatankuasa untuk dengar. Tak perlu. B

[21] When asked who are the complainants in this case, DW1's responded:

J: Dia bukan seorang yang boleh dikenali oleh sebab maklumat ini diterima daripada beberapa surat layang atau tomahan. C

[22] In other words the information was obtained through flying letters or allegations without disclosing the sources of the information.

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[23] In this case the plaintiff in his representations also asked for evidence and document relating to the charges be made available to him. Similarly he did not receive any positive response from the defendants.

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[24] Considering the nature of the charges against the plaintiff, we find them to be general in nature, lacking in particulars as to the manner in which the alleged corruption took place. Questions may be raised as to how the money was paid, was it in cash or through cheque and whether there is any documentary or other evidence to support such allegations. F

[25] As for the alleged relation between the plaintiff and one Chinese lady, again the question is whether this allegation was supported by any credible evidence. If there was such evidence why it could not be furnished to the plaintiff to enable him to rebut the same. It must always be remembered that allegations of this nature can easily be made and not easy to rebut. G

[26] In the circumstances, after considering the charges levelled against the plaintiff, we are of the view that in all fairness the plaintiff ought to have been given an oral hearing as requested by him. Similarly documentary and other evidence purportedly relied upon by the first defendant in arriving at his finding ought to have been made available to him to enable the plaintiff to make an effective and meaningful defence to the charges. In the circumstances we agree with the plaintiff's counsel that there had been a clear breach of the rules of natural justice as embodied in H I

art. 135(2) of the Federal Constitution which renders the disciplinary proceedings null and void. In this regard we are reminded of the observation made by L. Denning in *B. Surinder Singh Kanda v. The Government of The Federation of Malaya* [1962] 28 MLJ 169, at the p. 172 which reads:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L.C. in *Board of Education v. Rice* [1911] AC 179, 182; 27 TLR 378) down to the decision of their Lordships Board in *Ceylon Unniversity v. Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631, PC).

Conclusion

[27] For the reasons stated above we allowed the appeal by the plaintiff and ordered that the defendants bear the costs both here and in the court below. Accordingly:

(i) we set aside the order of dismissal of the plaintiff and ordered that he be reinstated in the police force, and

(ii) the Registrar of the High Court Malaya will conduct an enquiry to determine the salaries, emoluments and other benefit due to the plaintiff.

[28] My learned brother YA Dato' Abdul Kadir Sulaiman (FCJ prior to his retirement) had since retired and have not had the benefit of reading this judgment. My learned brother YAA Tan Sri Richard Malanjum (now CJSS) has seen this judgment in draft and has expressed his agreement with the same.